

SOVEREIGNTY IN INTERNATIONAL LAW – HOW THE INTERNET (MAYBE) CHANGED EVERYTHING, BUT NOT FOR LONG*

by

DAN JERKER B. SVANTESSON**

*"Among the theories of jurists, there is, perhaps, none which has been a battle-ground for so long a time, as that which relates to the limits of sovereign power."*¹

1. INTRODUCTION

More than once has the concept of sovereignty been declared as passé, obsolete unworkable or even dead, due to societal or technological developments. This article focuses on the extent to which the Internet has challenged, and continues to challenge, the concept of sovereignty. Focusing on sovereignty in the context of control over Internet conduct, it seeks to demonstrate that, while the Internet has challenged sovereignty to a degree, geo-location – the identification of the geographical location of Internet

* In parts, this article draws, and expands, upon previous publications on related topics such as: Dan Svantesson, *Private International Law and the Internet 2nd Ed.* (Kluwer Law International, 2012), Dan Svantesson, *Extraterritoriality in Data Privacy Law*, Ex Tuto Publishing (November 2013), Dan Svantesson, Celebrating 20 years of WWW – a reflection on the concept of jurisdiction, *Masaryk University Journal of Law and Technology*, Vol. 6 No. 1 (2012); pp. 177-190, and Dan Svantesson, Time for the law to take Internet geo-location technologies seriously, *Journal of Private International Law* Vol 8 No 3 (December 2012); pp. 473-487.

** Professor and Co-Director, Centre for Commercial Law, Faculty of Law, Bond University (Australia). Researcher, Swedish Law & Informatics Research Institute, Stockholm University (Sweden). Professor Svantesson is the recipient of an Australian Research Council Future Fellowship (project number FT120100583). The views expressed herein are those of the author and are not necessarily those of the Australian Research Council. The author expresses his gratitude to the anonymous reviewers for their valuable comments.

¹ A. Lawrence Lowell, *The Limits of Sovereignty*, 2 *Harvard Law Review* 70 (1888-1889), at 70.

users – is a ‘game-changer’ re-emphasising the significance of geography and implicitly the significance of (territorial) sovereignty.

The paper then makes a proposal for a potential future direction for the concept of sovereignty in the Internet context. More specifically, I seek to introduce a doctrine of “market sovereignty” backed up by what can be termed “market destroying measures”.

However, first of all, I want to draw attention to a recent case of relevance for the topic under discussion. As odd as it may sound, the case involves a trespassing dog that almost shut down Facebook in Brazil.

Put briefly, the background facts are as follows. A dog was said to have trespassed onto a neighbour’s land. As a result some potentially defamatory remarks were posted on a Facebook site. This resulted in an injunction being sought to have the potentially offending content removed. Facebook Brazil first objected, pointing to standard arguments such as that it does not control the content and infrastructure adding that: “[the task of managing content and infrastructure] is the responsibility of two other distinct and autonomous companies, called Facebook Inc and Facebook Ireland Ltd, located in the United States and Ireland respectively.”²

This response did not please the Court:

Judge Bonvicino stated that Facebook’s reply was an ‘outrageous disregard’ of Brazilian sovereignty, which is ‘aggravated by the notorious spying activities of the US government.’ The Judge also noted that ‘Facebook is not a sovereign country superior to Brazil.’ Hence, the Court concluded that if Facebook wants to operate in Brazil, it must be subject to the Brazilian laws, regardless of where the parent companies are incorporated.³

Facebook was given 48 hours to remove the discussion. Failure to comply would result in “the judge ordered the Brazilian telecoms to block all Facebook IP domains and redirect them to a courtesy page displaying the

² Giancarlo Frosio, A Brazilian Judge Orders Facebook off Air if It Fails to Remove a Defamatory Discussion (October 7, 2013) <http://cyberlaw.stanford.edu/blog/2013/10/brazilian-judge-orders-facebook-air-if-it-fails-remove-defamatory-discussion>.

³ Giancarlo Frosio, A Brazilian Judge Orders Facebook off Air if It Fails to Remove a Defamatory Discussion (October 7, 2013) <http://cyberlaw.stanford.edu/blog/2013/10/brazilian-judge-orders-facebook-air-if-it-fails-remove-defamatory-discussion>.

court order.”⁴ In the end, however, Facebook complied with the order and removed the content in question.

Blogging about the matter, Giancarlo Frosio has pointed out that: “Brazilian courts ought to be careful in threatening to shut down entire platforms over individual disputes. Tainted by nationalistic bias, these decisions may overlook the fact that millions of Brazilian users, businesses, and institutions, including the Tribunal of São Paulo, are using those platforms daily.”⁵ This is an important point, and I will have reason to return to both that remark as such, and the case in general, in the below.

Before proceeding, it is important to distinguish between sovereignty in the context of states being able, or unable, to *control Internet conduct* on the one hand, and sovereignty in the context of states being able, or unable, to *control Internet technology* on the other. The first matter is, as noted, the topic of this paper. However, a few introductory remarks are needed about the latter.

2. SOVEREIGNTY OVER CONDUCT OR SOVEREIGNTY OVER THE TECHNOLOGY?

Never in human history have we seen a technology that plays such a large and diverse part in society as does the Internet. Importantly, this technology – including fundamental matters such as what that technology can, and cannot, do – are largely in the hands of technology developers rather than in the hands of individual sovereign nation states. Only states with extremely strong determination, and with a lacking concern about their citizens missing out on certain online facilities, are able to exercise a relatively high level of control in respect of Internet technology. They do so, for example, by restricting international Internet communications to flow only through governmentally controlled channels, by blocking foreign content and by banning some technologies.

Open democratic states have a much harder time controlling Internet technology. Lessig brought popular attention to, and increased understanding of, the fact that the Internet is being regulated both through law and technical developments in his widely read, *Code and Other Laws of Cyber-*

⁴ Giancarlo Frosio, A Brazilian Judge Orders Facebook off Air if It Fails to Remove a Defamatory Discussion (October 7, 2013) <http://cyberlaw.stanford.edu/blog/2013/10/brazilian-judge-orders-facebook-air-if-it-fails-remove-defamatory-discussion>.

⁵ Giancarlo Frosio, A Brazilian Judge Orders Facebook off Air if It Fails to Remove a Defamatory Discussion (October 7, 2013) <http://cyberlaw.stanford.edu/blog/2013/10/brazilian-judge-orders-facebook-air-if-it-fails-remove-defamatory-discussion>.

space,⁶ but many of his main ideas were presented already in an earlier article:

I said that we could understand regulation in real space as a function of four sorts of constraints-law, norms, markets, and what I called real space code. We can understand regulation in cyberspace in the same way. Regulation in cyberspace is a function of similar constraints. It too is a function of the constraints of law, of norms, of the market, and of what I will call, 'code.'⁷

While Lessig outlines four mechanisms for regulation, only the relation between legal code and computer code is of relevance here, and in referring to architecture as 'code', Lessig states that:

[o]nce it is plain that code can replace law, the pedigree of the code-writers becomes central. Code in essence becomes an alternative sovereign -- since it is in essence an alternative structure of regulation. But who authors this sovereign authority? And with what legitimacy?⁸

In this sense, the Internet still challenges sovereignty – a state may be able to control most technologies used with its territory, for example by placing restrictions on the import of certain types of technologies – but in the case of the Internet, states are forced to accept the technology as is provided, without being able to influence it, to a greater degree. In a sense, what we are dealing with here can be viewed as an illustration of a situation in which states, to obtain what they see as useful from Internet technology, also have to accept the parts they which to exercise their right of sovereignty to avoid.

Having made these observations, I can return to the main topic of sovereignty in the context of states being able, or unable, to control Internet conduct.

⁶ Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

⁷ Lawrence Lessig's 1997 working draft of *The Law of the Horse: What Cyberlaw Might Teach* (Stanford Technology Law Review - no longer available online). See further: Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harvard Law Review 501(1999), at 506-508.

⁸ Lawrence Lessig, *The Law Of The Horse: What Cyberlaw Might Teach* (as referred to in: Graham Greenleaf, *An Endnote on Regulating Cyberspace: Architecture vs Law?* (1998) University of New South Wales Law Journal, Volume 21, Number 2).

3. THE CONCEPT OF SOVEREIGNTY IN INTERNATIONAL LAW

If one accepts the somewhat artificially ascertained time of birth of the 'sovereign nation state' as being the conclusion of the Peace Treaty of Westphalia, 'sovereignty' (in that sense) is now 365 years old.⁹ It is, thus, only healthy that it is subject to discussion and analysis at regular intervals.

Some articles deal with the concept of sovereignty in international law in great detail. Here it suffices to make a few relatively rudimentary observations about the concept of sovereignty in international law so as to lay the foundation for the discussion to come below in this article.

First of all, it may be noted that 'sovereignty' as a concept is both easy and hard to define. If one is content with a relatively basic, functional and arguably superficial definition, one need only turn to a legal dictionary, or standard text on public international law, to find that sovereignty¹⁰ means something along the lines of "the ability of a state to act without external controls on the conduct of its affairs."¹¹ Or, as Endicott puts it:

Sovereignty, it seems, is:

- absolute power within a community, and
- absolute independence externally, and
- full power as a legal person in international law.¹²

Or even more usefully as prominent commentator Brownlie puts it:

The corollaries of the sovereignty and equality of states are: (a) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (b) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the ultimate dependence upon consent of obligations arising whether from customary law or from treaties.¹³

⁹ The *theory* of sovereignty dates back at least to 1576. See further: Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 Am.J.Comp.L., 297 (1953), at 305.

¹⁰ It is important to note that we here are focusing on legal sovereignty, rather than what Steinberg has termed "behavioral sovereignty", see further: Richard H. Steinberg, Who is Sovereign?, 40 *Stanford Journal of International Law* 330 (2004).

¹¹ James R. Fox, *Dictionary of International and Comparative Law* 2nd Ed. (Oceana Publications Inc, 1997, Dobbs Ferry, New York).

¹² Timothy Endicott, *The Logic of Freedom and Power*, in Samantha Besson & John Tasioulas (eds.), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010), at 245.

¹³ James Crawford, *Brownlie's Principles of Public International Law* 8th Ed. (Oxford University Press, 2012, Oxford), at 447.

At the same time, if one allows oneself to 'dig deeper' it soon becomes clear that there is a degree of disagreement as to the exact delineation of the concept of sovereignty, and attempts at a precise definition may be as fruitless as they are frustrating.¹⁴ One of the reasons for this is that, there is more than one conception of sovereignty.¹⁵ Another reason is to be found in the fact that, the term carries more than one meaning¹⁶ and debates about the meaning of sovereignty have taken place on a variety of arenas. For example, arguably the most intense discussions of the meaning of sovereignty have taken place in the context of the source(s) and limitation(s) of sovereignty in the sense of whether a sovereign's rights are unfettered.¹⁷ Here, we need not busy ourselves with that discussion.

A more potent way for us to approach the concept of sovereignty is to do so from the angle of Olivecrona's perspective on rights. Discussing the meaning, or lack thereof, of the terms "rights" and "duties", Olivecrona observed that:

The sentence that A is the owner of this piece of land functions as a *permissive sign* for himself with regard to this piece of land; at the same time it acts as a *prohibitive sign* for everybody else. The sentence is a green light for the owner, a red light for the others.¹⁸

Applying this to the concept of sovereignty it seems that international law provides both green lights as to what rights the sovereign nation state enjoys, and red lights for other states in respect of the sovereignty of a spe-

¹⁴ See e.g. Christopher Harding and C. L. Lim, *The Significance of Westphalia: An Archaeology of the International Legal Order*, in C. Harding and C.L. Lim (eds.), *Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Kluwer Law International, 1999) at 3, noting how "to strive for an exact meaning of, for example, 'statehood', 'sovereignty', or 'consent' as organising ideas of the subject [of international law] is likely to be a fruitless task".

¹⁵ See e.g. Philip Bobbitt, *Public International Law*, in Dennis M. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*. Blackwell Publishers (1996), at 109-110: "European sovereignty proceeds by descent from that of princes whose dynastic legitimacy was inherited by the states that they called into being; for this reason all states, like all princes, are equal with respect to the law. American sovereignty, by contrast, derives its legitimacy from its relationship to popular consent with similar consequences for the universality of international law and the equality of states, but for different reasons and, potentially, with somewhat different consequences."

¹⁶ See e.g. James Crawford, *Brownlie's Principles of Public International Law* 8th Ed. (Oxford University Press, 2012, Oxford), at 448, noting that "The term 'sovereignty' is variously used to describe the legal competence which states have in general, to refer to a particular function of this competence, or to provide a rationale for a particular exercise of this competence." See also pp. 204-206 of the same work.

¹⁷ See e.g. A. Lawrence Lowell, *The Limits of Sovereignty*, 2 *Harvard Law Review* 70 (1888-1889) discussing whether sovereignty, in its nature, is unlimited or not.

¹⁸ Karl Olivecrona, *Legal Language and Reality*, in *Essays in Jurisprudence in Honor of Roscoe Pound*. Ed. R. A. Newman, 151-91. Indianapolis, IN: Bobbs-Merrill. 1962, at 183.

cific state. Looking at this matter from the perspective of jurisdictional claims over Internet conduct, however, it becomes clear that both the green lights and the red lights are rather blurred – or perhaps they are in fact amber.¹⁹ More precisely, there are some clear and some blurred green lights, while all the red lights are more or less blurred, or amber.

For example, stemming in no small part from the concept of sovereignty, international law gives a clear green light for states to exercise jurisdiction over their territories (the subjective territoriality principle²⁰) and their nationals (the nationality principle²¹). Further, a bit simplified, international law gives blurred green lights in relation to other grounds for jurisdiction somewhat less firmly rooted in sovereignty, such as objective territoriality principle,²² the passive personality principle,²³ and the so-called effects doctrine.²⁴

The red lights are fewer and more blurred, or indeed amber. However, it seems clear that, in establishing the principle of sovereignty and equality of states, Article 2(1) of the *Charter of the United Nations*²⁵, not only highlights that some form of territoriality principle and some form of nationality principle are permitted under international law, it also emphasises that limits are placed upon these principles. As noted by Gerber:

When a state attaches legal consequences to conduct in another state, it exercises control over that conduct and when such control affects essential interests in the foreign state, it may constitute an interference with the sovereign rights of that foreign state. Consequently, the

¹⁹ For some potent statements about the relation between sovereignty, territory and jurisdiction see e.g. Mann noting that “International jurisdiction is an aspect or an ingredient or a consequence of sovereignty (or of territoriality or of the principle of non-intervention – the difference is merely terminological). (F.A. Mann, ‘The Doctrine of International Jurisdiction Revisited After Twenty Years’ (1984) 186 *Recueil des Cours* 9, at 20); and Steinberger pointing out that “Exclusivity of jurisdiction of States over their respective territories is a central attribute of sovereignty.” (Helmut Steinberger, ‘Sovereignty’, in Rudolf Bernhardt (ed.) *Encyclopaedia of Public International Law* (1987), Vol. 10, 397, at 413).

²⁰ James Crawford, *Brownlie’s Principles of Public International Law* 8th Ed. (Oxford University Press, 2012, Oxford), at 458.

²¹ James Crawford, *Brownlie’s Principles of Public International Law* 8th Ed. (Oxford University Press, 2012, Oxford), at 459-460.

²² James Crawford, *Brownlie’s Principles of Public International Law* 8th Ed. (Oxford University Press, 2012, Oxford), at 458-459.

²³ James Crawford, *Brownlie’s Principles of Public International Law* 8th Ed. (Oxford University Press, 2012, Oxford), at 461.

²⁴ James Crawford, *Brownlie’s Principles of Public International Law* 8th Ed. (Oxford University Press, 2012, Oxford), at 462-464.

²⁵ Charter of the United Nations, adopted by the UN General Assembly of October 24, 1970.

principle of non-interference is properly applicable to the exercise of jurisdiction.²⁶

Or in other words “when one sovereign oversteps its bounds, it [often] encroaches on the prerogatives of another”²⁷ which ought to in some case activate the red lights.

4. THE INTERNET WAS (INTENDED TO BE) DIFFERENT

The Internet has a relatively short history. It is rooted in work in the late 60's commissioned by the US Department of Defence and only started to gain widespread utility in the mid 90's. However, in its short life span it has had time to fundamentally change the world we live in, and indeed, how we live our lives in the world we live in.

Further, despite its short life span to date, the Internet, and how we use it, has changed considerably over the years. Similarly, the way in which the law approaches the Internet and Internet conduct has changed fundamentally over the years.

Elsewhere, I have identified four distinct phases showcasing very different legal attitudes towards the application of private international law rules to Internet conduct starting with a kind of *terra nullius* thinking and now entering a state of equilibrium having gone through overregulation and then a degree of under-regulation.²⁸ That discussion will not be repeated here. However, to understand how the Internet has affected how we approach the concept of sovereignty, it is useful, not to say necessary, to gain some insight into the broader legal thinking in relation to jurisdiction over Internet conduct.

Almost 20 years ago, in 1996 Barlow famously unveiled a *Declaration of the Independence of Cyberspace*. One of the key features of that Declaration reads as follows:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of

²⁶ David J. Gerber, *Beyond Balancing: International Law Restrains on the Reach of National laws*, 10 Yale Journal of International Law 185 (1984), at 212.

²⁷ Henry H. Perritt, Jr., *The Internet is Changing the Public International Law System*, 88 KY L. REV. 885 (2000), as found at <http://www.kentlaw.edu/cyberlaw/perrittnetchg.html>.

²⁸ Dan Svantesson, *Celebrating 20 years of WWW – a reflection on the concept of jurisdiction*, Masaryk University Journal of Law and Technology, Vol. 6 No. 1 (2012); pp. 177-190.

the future, I ask you of the past to leave us alone. You are not welcome among us. *You have no sovereignty where we gather...*²⁹

As I have pointed out elsewhere,³⁰ the somewhat enigmatic quality of this Declaration may make it look amusingly eccentric, or even utterly absurd, today. However, in fairness, it must be viewed in its context – a world at a time when people consciously decided to “go” online and spend time “in” Cyberspace for a set period of time.

It is no doubt the case that, the world of today is different to this in that we do not go online as such. Cyberspace is integrated into our lives through a continuous Facebook presence, tablets, smart phones and Internet-connected kitchen appliances – we are experiencing a conflation of the online and offline world.

In any case, it is indeed difficult to imagine a clearer step away from traditional notions of state sovereignty than this Declaration, and the notion expressed in Barlow’s Declaration can also be found expressed, perhaps more elegantly, in legal scholarly discourse; most prominently, Johnson and Post’s *Law And Borders--The Rise of Law in Cyberspace*.³¹ There, the authors argued that the Internet should be viewed as a separate ‘space’,³² beyond the control of individual nations’ regulation. Moreover, the article suggested that, to the extent that this separate space is to be regulated, such regulations would emerge in the form of self-regulation.³³

Another noteworthy example of how Internet conduct has been seen to be beyond the reach of sovereign states is found in Menthe’s writings on the Internet as an international space akin to Outer Space, the High Seas and Antarctica.³⁴

Having illustrated how there are currently three international spaces, and that ‘cyberspace’ should be the fourth, Menthe described how the ‘nationality principle’ has been applied to regulate behaviour in these spaces.

²⁹ Barlow, J. P. 1996, A Declaration of the Independence of Cyberspace, <https://projects.eff.org/~barlow/Declaration-Final.html> (emphasis added).

³⁰ Dan Svantesson, Celebrating 20 years of WWW – a reflection on the concept of jurisdiction, *Masaryk University Journal of Law and Technology*, Vol. 6 No. 1 (2012); pp. 177-190.

³¹ David Johnson and David Post, *Law And Borders--The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996).

³² David Johnson and David Post, *Law And Borders--The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996) at 1378.

³³ David Johnson and David Post, *Law And Borders--The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996) at 1367.

³⁴ Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 Mich. Telecomm. & Tech. L. Rev 69 (1998).

In doing so he noted that all three international spaces rely on the nationality principle (e.g. the 'law of the flag' from maritime law),³⁵ and made the point that "[s]imilarly, a webpage would be ascribed the nationality of its creator, and thus not be subject to the law of wherever it happened to be downloaded."³⁶

Thus, on the whole Menthe must be credited with the creation of a rather complex and well-developed model for placing the Internet, or Cyberspace, beyond the direct control of the sovereign nation state.

The ideas presented by commentators such as Barlow, Menthe, Johnson and Post were not unchallenged, and the charge against Johnson and Post's 'regulation scepticism' was led by Goldsmith primarily through his *Against Cyberanarchy* published in 1998.³⁷

More recently, it has also been noted that, modern technology can work to strengthen 'behavioral sovereignty':

[P]owerful states are harnessing these [including the Internet] and other technologies to enhance their own power over domestic society and international competitors. The development and use of sophisticated reconnaissance satellites, communications interception systems such as ECHELON, cross-border Internet searches, and precision weapons are some examples of how the United States is enhancing its behavioral sovereignty – and diminishing that of other states – through technology.³⁸

Nevertheless, the notion of the Internet as something beyond state sovereignty – a direct attack on the concept of sovereignty – remains remarkably persistent even though the calls for an unregulated 'Wild Wild Web' have largely died down.³⁹

³⁵ Menthe, D. C. 1998, *Jurisdiction in Cyberspace: A Theory of International Spaces*, Michigan Telecommunications and Technology Law Review 69, vol. 4, p. 83.

³⁶ Menthe, D. C. 1998, *Jurisdiction in Cyberspace: A Theory of International Spaces*, Michigan Telecommunications and Technology Law Review 69, vol. 4, p. 74.

³⁷ Goldsmith, J. L. 1998, *Against Cyberanarchy*, University of Chicago Law Review, vol. 65, p. 1250.

³⁸ Richard H. Steinberg, Who is Sovereign?, 40 *Stanford Journal of International Law* 330 (2004), at 339 (footnotes omitted).

³⁹ See e.g. Joshua S. Bauchner, State Sovereignty and the Globalising Effect of the Internet, 26 *Brook. J. Int'l. L.* 689 (2000), at 689.

5. OTHER (INDIRECT) ATTACKS ON SOVEREIGNTY

If we accept, as I think we need to do, Brownlie's corollaries of sovereignty to include 'a duty of non-intervention in the area of exclusive jurisdiction of other states', we find a wealth of decisions by courts and legislative initiatives from various states that arguably are inconsistent with the concept of sovereignty. For example, when the High Court of Australia decided that Victorian businessman Joseph Gutnick could take action in a Victorian court against US-based publisher Dow Jones, and have the defamation law of Victoria determine the dispute,⁴⁰ it clearly intervened in an area the US may claim exclusive jurisdiction over; that is, the freedom of speech of persons located within its territory. After all, Dow Jones had taken all its actions within the US.

Australia is by no means unique in its approach and perhaps the most interesting illustration of this type of indirect attacks on sovereignty is found in the protracted dispute between some Jewish rights groups in France and US Internet company Yahoo! Inc.⁴¹

Put briefly, this transatlantic dispute between US Internet company, Yahoo!, and two French associations, La Ligue Contre Le Racisme et L'Antisemitisme and L'Union Des Etudiants Juifs De Franc, related to Yahoo!'s operation of a website which, amongst other things, contained an auction service where Nazi memorabilia/junk was frequently on offer.⁴² The website could be described as the Yahoo! family's 'flagship', and in contrast to the country-specific Yahoo! sites (e.g., www.yahoo.fr), this site was said to be aimed at the world at large.⁴³ When La Ligue Contre Le Racisme et L'Antisemitisme et al. attempted to have Yahoo! remove the Nazi material from the auction service, in accordance with French penal Code,⁴⁴ Yahoo! refused.

The French Court characterized Yahoo!'s activities as a tort (*faute*) and issued a civil law injunction based on the French Code of Civil Procedure. The Court ruled that Yahoo! must take steps to prevent French Internet

⁴⁰ *Dow Jones & Company Inc. v. Gutnick* (2002) 210 CLR 575.

⁴¹ *Union of French Jewish Students (UEJF) v Yahoo! Inc.* County Court of Paris, 20 November 2000.

⁴² However, the auction service was not at all specifically designed for the purpose of auction Nazi material.

⁴³ A notion backed by the fact that country-specific advertisement was provided on the site.

⁴⁴ *French Penal Code* 1791 Article R645-1.

users from accessing the sections of the auction site containing Nazi memorabilia.⁴⁵

In response to this, Yahoo! sought and obtained a summary judgment from a US court to the effect that US courts would not enforce the French decision. While acknowledging France's right to make law for France, Fogel J. decided in Yahoo!'s favour, granting the summary judgment, declaring that the 'First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet.'⁴⁶

The *Yahoo!* case, as well as the *Gutnick* case, illustrate a matter of fundamental importance; the Internet has created, or at least widened, the gap between reasonable grounds for jurisdictional, and application of law, claims on the one hand and reasonable grounds for recognition and enforcement of foreign judgments on the other.⁴⁷ Put differently, while the French Court in *Yahoo!* and the Australian Court in *Gutnick* may justify their approaches by reference to sovereignty, they arguably also violate the corollary duty of non-intervention in the area of exclusive jurisdiction of other states.

In a sense then, cases such as these can be seen both as strong assertions of sovereignty, and as violations of the corollary duty of non-intervention.

6. RARE EXAMPLES OF A PERSISTENT RESPECT FOR THE DUTY OF NON-INTERVENTION

The above should not be seen as suggesting a universal disregard of, or lack of faith in, the concept of sovereignty and the corollary duty of non-intervention amongst courts and (other) law makers. Examples can, indeed, be found of courts and law makers showing reluctance to exercise jurisdiction

⁴⁵ *International League Against Racism & Anti-Semitism (LICRA) v. Yahoo! Inc.* [2000] County Court of Paris.

⁴⁶ *Yahoo!, Inc. v La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp. 2d 1181 (N.D. Cal. 2001), p. 22. See also: *Yahoo!, Inc. v La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

⁴⁷ The existence of this gap has long been acknowledged (see, e.g., A. A. Ehrenzweig, *A Treatise on the Conflict of Laws* (St. Paul, West Publishing Co., 1962) 8); and M. Wolff, *Private International Law* (2nd edn, London, Oxford University Press, 1950) 53 (as reproduced in M. Akehurst, 'Jurisdiction in International Law' (1973) 46 *British Year Book of International Law*, 238), stating: 'every State is inclined to concede to its own courts a wider jurisdiction than it is prepared to recognize in foreign courts, and no rule of international law prevents States from establishing such discordance'. However, there is a surprising paucity of discussion of 'the gap'.

over matters with foreign elements out of concern for how such an exercise of jurisdiction may impact the sovereignty of other states.

Looking at Australian law, a very clear example of such behaviour can be found in *Macquarie Bank Limited & Anor v Berg*.⁴⁸ There, the Supreme Court of New South Wales had to decide whether to grant an injunction restraining the defendant from publishing allegedly defamatory material on a particular website.⁴⁹

The Court was clearly guided by the perception that “[o]nce published on the Internet material can be received anywhere, and it does not lie within the competence of the publisher to restrict the reach of the publication.”⁵⁰ Thus, despite the plaintiffs limiting the order sought to publications within New South Wales, Simpson J refused the order, stating that:

An injunction to restrain defamation in NSW is designed to ensure compliance with the laws of NSW, and to protect the rights of plaintiffs, as those rights are defined by the law of NSW. Such an injunction is not designed to superimpose the law of NSW relating to defamation on every other state, territory and country of the world. Yet that would be the effect of an order restraining publication on the Internet. It is not to be assumed that the law of defamation in other countries is coextensive with that of NSW, and indeed, one knows that it is not. It may very well be that according to the law of the Bahamas, Tazhakistan [sic], or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court.⁵¹

This then is an example of how sovereignty and the corollary duty of non-intervention are seen to stand in the way of the effective regulation of the Internet.

⁴⁸ [1999] NSWSC 526.

⁴⁹ The matter was complicated by the fact that, the defendant in this action arguably was not the publisher of the allegedly defamatory website. During the proceedings a US resident, Fernando Adrian Sirio, stated in an affidavit that he was the responsible publisher, and that he had constructed the relevant website in conjunction with his studies at University of California, San Diego. It was, however, admitted that Mr Sirio had received some of the material from Mr Berg.

⁵⁰ *Macquarie Bank Limited v Berg* [1999] NSWSC 526 para 12. There will be reason to re-examine this perception below.

⁵¹ *Macquarie Bank Limited v Berg* [1999] NSWSC 526 para 14.

7. GEO-LOCATION AS A 'GAME-CHANGER' IN THE CONTEXT OF SOVEREIGNTY

The three cases discussed above – *Gutnick*, *Yahoo!* and *Macquarie Bank* – are of interest also for reasons other than those already put forward. While decided virtually simultaneously, the courts in the *Yahoo!* case and in the *Macquarie Bank* case could not have taken more bi-polar approaches to the question of whether content may be restricted by reference to geographical criteria online. As seen in the quotes above, the *Macquarie Bank* court made a big point of the fact that “[o]nce published on the Internet material can be received anywhere, and it does not lie within the competence of the publisher to restrict the reach of the publication.”⁵² In sharp contrast, the Court in *Yahoo!*, relying on expert testimonies, concluded that: “it may be estimated in practice that over 70% of the IP addresses of surfers residing in French territory can be identified as being French.”⁵³

In this part, I will discuss the true state of the technologies that these courts looked at so differently.

Since 2004, I have written 14 articles and notes, and given numerous talks and conference presentations, on the legal implications of so-called geo-location technologies. The fact that I still get to publish on this topic is a strong testament to the insignificance of the impact my writings have had to date. However, geo-location technologies remain of significant legal importance, not least for the topic of this paper. Indeed, I will here present arguments suggesting that geo-location technologies have largely neutralised the threat the Internet may have posed to the concept of sovereignty.

Today, we are in the unfortunate position that, while we all can see that access to Internet content is location-dependent,⁵⁴ and while Internet companies make significant use of location data,⁵⁵ the law makers typically ignore geo-location⁵⁶ and lobbyists deny or emphasise such technologies as they see fit.⁵⁷

⁵² *Macquarie Bank Limited v Berg* [1999] NSWSC 526 para 12.

⁵³ *International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v Yahoo! Inc.* County Court of Paris, interim court order of 20th of November 2000. However, it would seem that one of the experts, Ben Laurie, later felt a need to explain his statement. (Ben Laurie ‘An Expert’s Apology’ at <http://www.apache-ssl.org/apology.html>).

⁵⁴ See e.g. the difference in search results one gets when ‘googling’ for the same search term in different countries (try to search for the term “car” for example).

⁵⁵ There is an ever increasing amount of *location-based* and *location-aware* online services, such as Google Maps, Ovi, Foursquare and HTC Sense.com.

However, the technological reality is that, where they use geo-location technologies, providers of Internet content can effectively limit the geographical distribution of their content. In 2007, the Court in *ACLU v Gonzales*⁵⁸ reviewed expert testimony relating to Quova's geo-location technologies, and noted the following:

A product that Quova markets can determine, within a 20 to 30 mile radius, the location from which a user is accessing a Web site through a proxy server, satellite connection, or large corporate proxy. The fact that Quova can only narrow down a user's location to a 20 to 30 mile radius results in Quova being unable to determine with 100 percent accuracy which side of a city or state border a user lives on if the user lives close to city or state borders. If a visitor is accessing a Web site through AOL, Quova can only determine whether the person is on the East or West coast of the United States. Quova has been used by Web site operators to direct traffic so that only users in the United States can view products that can only be distributed in the United States and to customize content for users in the United States as opposed to users in a another country. The services Quova offers can cost anywhere from \$6,000 to \$500,000 a year.⁵⁹

Another provider, Digital Element, claims that its product *NetAcuity* is over 99.9% accurate at a country level and over 95% accurate at a city-level, worldwide.⁶⁰

⁵⁶ For instance, in 2010, the European Court of Justice (ECJ) handed down its decision in the joined cases of *Pammer v Reederei Karl Schlüter GmbH & KG* (Case C-585/08) and *Hotel Alpenhof GmbH v Oliver Heller* (Case C-144/09). The key question, common to both cases, was whether the fact that a website can be consulted on the Internet in the Member State of the consumer's domicile is sufficient to justify a finding that commercial or professional activities are being directed to that Member State within the meaning of Article 15(1)(c) of Regulation No 44/2001. Importantly, one of the parties – Hotel Alpenhof – had argued that “[a]ccount should be taken of the characteristics of the internet, which makes it impossible to restrict information to Austrian territory.” (Opinion of Advocate General Trstenjak delivered on 18 May 2010, para 32). It is remarkable that, neither the Advocate General, nor the Court, recognised the need to discuss this absurd denial of the existence of geo-location technologies. After all, few matters can have greater bearing on the question of whether the relevant activities had been ‘directed to the consumers’ forum country or not.

⁵⁷ For example, lobbying in relation to the *Rome II Regulation*, Amazon.com stated that: “[I]t is impossible for an on-line company to verify even where any one website visitor is based, and therefore which country's non-contractual law should apply under Rome II.” (*European Commission (JHA) Consultation on a Preliminary draft Proposal for a Council Regulation on the law applicable to Non-contractual Obligations (“Rome II” Regulation) Response of Amazon.com* (Sept. 2002) available at http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/amazon_com_en.pdf)

⁵⁸ *ACLU v Gonzales*, 478 F Supp 2d 775 (ED Pa 2007).

⁵⁹ *ACLU v Gonzales*, 478 F Supp 2d 775 (ED Pa 2007), paras 182-186.

⁶⁰ Digital Element ‘NetAcuity IP Location Technology’ available at http://www.digitalelement.com/our_technology/our_technology.html.

The impact such technologies has on the concept of sovereignty should be obvious to everyone – by bringing back the relevance of geography and national territorial borders to the Internet landscape, they also bring back the validity of sovereignty of national territories as the foundation for regulation.

8. TIME TO RE-THINK THE CONCEPT OF ‘SOVEREIGNTY’

The fact that geo-location technologies have brought back geography to the formerly ‘borderless’ and ‘location-independent’ Internet must not necessarily be seen as a conclusive victory for the concept of sovereignty we have grown accustomed to.

After all, technology changes constantly and inevitably. Should we find ourselves in a situation marked by widespread and effective circumvention of geo-location technologies, the effect such technologies have on the concept of sovereignty will change.

Further, several other problems remain with the application of the current conception of sovereignty to Internet activities, and traditional focal-points may need to be reconsidered.

In light of this, it makes sense to re-evaluate the concept of sovereignty, without for that sake throwing out the proverbial baby with the proverbial bath water.

9. DOCTRINE OF “MARKET SOVEREIGNTY” BASED ON THE EFFECTIVE REACH OF “MARKET DESTROYING MEASURES” – A POSSIBLE WAY FORWARD?

In discussions of Internet jurisdiction, it is commonly noted that the real impact of effective extraterritorial jurisdictional claims is severally limited by the intrinsic difficulty of enforcing such claim. For example, like many other commentators, Goldsmith and Wu note that: “[w]ith few exceptions governments can use their coercive powers only within their borders and control offshore Internet communications only by controlling local intermediaries, local assets, and local persons.”⁶¹

I would advocate the removal of the word “only” from the quoted statement made by Goldsmith and Wu so as to end up with the following sentence instead: *with few exceptions governments can use their coercive powers within their borders and control offshore Internet communications by controlling*

⁶¹ Jack Goldsmith and Tim Wu, *Who Controls the Internet?* 159 (2008) (emphasis added).

local intermediaries, local assets, and local persons. Such an alteration changes the nature of this statement from what unflatteringly can be called a relatively uninteresting cliché to a highly useful description of principles well-established at least 400 years ago.

The word “only” gives the impression that such powers are of limited significance for the overall question of such jurisdictional claims – and thereby for the concept of sovereignty – which is misleading. What I am getting at here is that the power governments have within their territorial borders, and over their nationals, can be put to great effect against offshore Internet communications. A government determined to have an impact on foreign Internet actors that are beyond its sovereignty and directly effective jurisdictional reach may introduce what we can call “market destroying measures” to penalise the foreign party. For example, it may introduce substantive law allowing its courts to, due to the foreign party’s actions and subsequent refusal to appear before the court, make a finding that:

- that party is not allowed to trade within the jurisdiction in question;
- debts owed to that party are unenforceable within the jurisdiction in question; and/or
- parties within the control of that government (e.g. residents or citizens) are not allowed to trade with the foreign party.

In light of this type of market destroying measures, the enforceability of extraterritorial jurisdictional claims – and by extension, the sovereignty of nation states – may not be as limited as it may seem at a first glance.

In this context, it is interesting to connect to the thinking of 17th century legal scholars, exemplified by Hugo Grotius (Hugo de Groot). Grotius stated that:

It seems clear, moreover, that sovereignty over a part of the sea is acquired in the same way as sovereignty elsewhere, that is, [...] through the instrumentality of persons and territory. It is gained through the instrumentality of persons if, for example, a fleet, which is an army afloat, is stationed at some point of the sea; by means of territory, in so far as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself.⁶²

⁶² Hugo Grotius on the Law of War and Peace 96 (Stephen C. Neff ed., 2012), at 112.

A similar reasoning can usefully be applied in relation to sovereignty in the context of the Internet, at least in some contexts. Instead of focusing on the location of persons, acts, or physical things – as is traditionally done for jurisdictional purposes – we ought to focus on marketplace control – on what we can call “market sovereignty”. A state has market sovereignty and, therefore justifiable jurisdiction, over Internet conduct where it can effectively exercise “market destroying measures” over the market to which the conduct relates.⁶³ Importantly, emphasis is here placed on control of the relevant market rather than over the relevant conduct.⁶⁴

Admittedly, allowing extraterritorial jurisdictional claims based on the doctrine of market sovereignty put forward here gives rise to wide claims of extraterritorial jurisdiction. This could be seen as problematic. At the same time, where the violation of the law of a state merely results in such market destroying measures, foreign defendants can comfortably carry on dealing with other markets should they not wish to comply with the laws of that state – importantly, the laws of one state do not impose on foreign parties not interested in the market place to which that law applies, and if a party wishes to engage on the market in question, it can hardly complain about having to comply with the same laws that apply to all other actors on that market.⁶⁵ Along a similar vein, it would seem peculiar for foreign states to complain about extraterritorial claims of jurisdiction where such claims are only pursued in relation to market destroying measures; after all, the regulation in question is then strictly limited to parties engaging in the market place over which the law maker in question has sovereignty.

Now let us connect all this to the Brazilian matter introduced above. The course set by the Brazilian court fits quite well with the doctrine of market sovereignty put forward here, and the steps the Court threatened to take fall squarely within the market destroying measures listed above. But what

⁶³ The exercise of such measures must necessarily be carried out in a non-discriminatory manner and will doubtless give rise to interesting questions under e.g. GATS, and possibly under EU anti-discriminatory measures. However, those discussions, while interesting in the extreme, go beyond the scope of this paper.

⁶⁴ An example may be illustrative. A company in state A is selling goods to people in state B via the Internet. In such a scenario, state A may put an end to the company's activity by making it unlawful to sell such goods to state B. Leaving aside the obvious exception of situations where such a ban would violate some international agreement, this is uncontroversial. However, state B may also claim jurisdiction over the conduct by reference to its market sovereignty as it potentially can put an end to the company's activity by implementing market destroying measures.

⁶⁵ It will clearly be necessary to define what is meant by a “market.” However, guidance for such a venture could perhaps be gained e.g. from the field of antitrust law.

about the concern that courts ought to be careful in threatening to shut down entire platforms over individual disputes?

In my view, the starting point must be a realisation that companies cannot be above the law simply due to the fact that society needs their services; after all, societies often depend on a range of private companies, like energy companies etc and we cannot let them be above the law. At the same time online businesses are commonly (intentionally or unintentionally) exposed to the laws of virtually every country on the planet, and the introduction of the doctrine of market sovereignty may be a useful mechanism for delineating which countries laws such companies should abide by. Companies such as Facebook must then take steps to ensure that their technical structures allows for compliance with multiple laws.

10. CONCLUDING REMARKS

The above has highlighted the existence of two schools of thought on the relationship between the concept of sovereignty on the one hand, and the Internet on the other. Some, such as Simpson J in *Macquarie Bank* has seen sovereignty as an obstacle to the effective reach of jurisdiction over Internet conduct. Others, have either viewed the Internet as a direct challenge to the concept of sovereignty as did Barlow, Menthe, Johnson and Post, or have mounted more indirect attacks on the application of the concept of sovereignty in the online context.

Importantly, these schools of thought share a common under-appreciation of the impact of geo-location technologies. To date, the introduction of geo-location technologies has worked as a 'game-changer' by re-introducing the relevance of location and by making it possible for providers of Internet content to limit the geographical distribution of that content. And while one can imagine counter-movements (e.g. driven by the aim of anonymity), in light of this, current Internet technology does no longer pose any real threat to the concept of sovereignty.

At the same time, it is argued that the time has come to reconsider the concept of sovereignty as applied in the Internet context, and a doctrine of "market sovereignty" backed up by "market destroying measures" is introduced. I hasten to acknowledge, however, that this doctrine and the arguments in its favour are introduced here in an insufficiently developed form, and are merely hoped to highlight the direction of a potential future path.